In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1085

THOMAS RICHARD WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his guilty plea was accepted without an adequate factual basis, in violation of Rule 11, Fed. R. Crim. P.

A three-count indictment filed in the United States District Court for the Southern District of Texas charged petitioner and Kim Crawford Bridenstine with importation of marihuana, possession of marihuana with intent to distribute, and conspiracy to possess, in violation of 21 U.S.C. 841, 846 and 960. At a hearing on February 27, 1973, petitioner and Bridenstine withdrew their pleas of not guilty to the conspiracy count and entered pleas of guilty. Before accepting the pleas, the district court inquired into whether the pleas were voluntary and knowing. The court asked whether it was true that the two of you agreed to violate the law by possessing with the intent to distribute it to other persons a

quantity of marihuana, that thereafter one or both of you did something, committed some act designed to carry out that plan, that this was all done unlawfully, knowingly and intentionally." (Pet. App. 6a, Tr. 3).[1] Petitioner replied, "Yes, sir." Following additional inquiry, retained defense counsel advised the court that his clients were from Michigan and asked for time to assist the probation officer in the preparation of the pre-sentence reports. The court granted the request (Tr. 4).

On April 23, 1973, petitioner and co-defendant Bridenstine appeared for sentencing. The court began the hearing by remarking that petitioners had entered pleas of guilty to a charge that they had conspired to possess 230 pounds of marihuana with intent to distribute (Tr. 6). Both defendants exercised their right to allocution, admitting that their conduct was the result of "thoughtlessness" and "stupidity" (Tr. 9). Defense counsel remarked that he had filed certain reports on behalf of his clients for the court to examine in addition to the presentence report. Counsel urged a sentence of probation in light of petitioner's age (23) and absence of a criminal record, terming his criminal activity an immature attempt "to make some fast money" (Tr. 9-10). The court rejected counsel's suggestion and imposed a sentence of three years' imprisonment, two years of special parole and a $500 fine. The court of appeals affirmed (Pet. App. 1a-2a; 485 F. 2d 686).

Petitioner contends that the record fails to show an adequate factual basis for acceptance of the plea, as

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[1]We are lodging with the Clerk of this Court the transcript of the hearings at which petitioner pleaded guilty and was sentenced ("Tr.").

required by Rule 11, Fed. R. Crim. P.[2] He states that if he had been asked personally about the underlying facts, he could not have furnished sufficient proof to establish the existence of a conspiracy, for in fact he had not conspired (Pet. 5). Petitioner's assertion evidently presupposes that the court must ascertain the factual basis before the plea is accepted, solely by questioning the entrant of the guilty plea. Petitioner misinterprets Rule 11. The report of the Advisory Committee on the 1966 Amendments, Rule 11, states that a factual basis can be obtained from any source, including prosecution and defnese counsel, a presentence report, "or otherwise." The record shows that prior to imposing sentence (and entering judgment) the district judge had a presentence report. Moreover, the court's inquiry at the time of plea, although tracking the language of the indictment, was sufficiently specific to indicate that petitioner's conduct constituted the offense charged. *Jimenez* v. *United States*, 487 F. 2d 212 (C.A. 5), certiorari denied as untimely filed, No. 73-6252, April 1, 1974. The court elicited a specific admission that an agreement was made to violate the law by possessing marijuana (Tr. 3). Accordingly, the court complied with Rule 11 before entering judgment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

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[2]Rule 11 provides in pertinent part: "The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

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